

SUPERIOR COURT  
of the  
State of Delaware

William L. Witham, Jr.  
Judge

Kent County Courthouse  
38 The Green  
Dover, Delaware 19901  
Telephone (302) 739-5332

January 3, 2005

Gregory R. Babowal, Esquire  
Department of Justice  
102 West Water Street  
Dover, Delaware 19901

Leo J. Ramunno, Esquire  
1205 North King Street  
Wilmington, Delaware 19801

Re: ***State v. Frederick Tolson***  
***I.D. No. 0211007845***

Dear Counsel:

The State is attempting to introduce rap lyrics allegedly written by Defendant, Frederick Tolson, as evidence of Defendant's state of mind or intent to sell or deliver drugs. The drugs were found in the basement of Defendant's grandmother's home, adjacent to a room where Defendant allegedly slept and where the lyrics were found. The State argues that the lyrics are admissible under D.R.E. 404(b) for the limited purpose of showing the defendant's intent and/or state of mind at the time he allegedly possessed the drugs in question in order to show that Defendant intended to sell or deliver the drugs. The State maintains that the lyrics are also admissible for purposes of identification (*i.e.*, to show that Defendant slept in the bedroom adjacent to the room where the drugs were found).

Intent or State of Mind

The first issue to consider is the basic relevancy of the evidence the State wishes to introduce. Evidence to be introduced in a trial must be relevant, meaning “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.”<sup>1</sup> In the instant case, any evidence of intent to sell or deliver the drugs which Defendant allegedly possessed would be a central and material issue because Defendant is charged with possession of drugs with the intent to deliver or sell them. The major concern is whether the lyrics written by Defendant are closely enough connected to these particular circumstances to provide evidence of intent or state of mind to sell or deliver these drugs. The lyrics make a number of references to selling drugs and even cooking drugs in the defendant’s grandmother’s kitchen but the lyrics make no reference to the particular situation in question or the specific drugs found in a room adjacent to where the lyrics were found and where Defendant allegedly slept.

*Joynes v. State*, the only Delaware case to admit rap lyrics into evidence, admitted lyrics written by the defendant as “other acts” evidence under 404(b) because the Court deemed the lyrics to be “material to determining [Defendant’s] intent or state of mind” in the incident in question.<sup>2</sup> In *Joynes*, the defendant was charged with possession of a deadly weapon during the commission of a felony, aggravated menacing and second-degree reckless endangering for holding a knife to his highschool classmate’s neck. The lyrics in *Joynes*, written by the defendant the day after the incident, mentioned that the victim was on Defendant’s “hit list” and that Defendant was proposing to put the heads of his enemies on a shelf.<sup>3</sup>

The lyrics the State wishes to present in the instant case do not contain such specific references to the acts of Defendant. The lyrics in the present case make a

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<sup>1</sup> D.R.E. 401.

<sup>2</sup> *Joynes v. State*, 797 A.2d 673, 677 (Del. 2002).

<sup>3</sup> *Id.*

number of vague references to the Defendant selling crack cocaine and being a “hustler.” The lyrics also contain the more specific remark “fred why are you cooking coke in grandma [sic] kitchen.” The few references in the lyrics to selling drugs are not specific enough to provide adequate evidence of intent or state of mind in the incident in question to outweigh their highly prejudicial nature. In addition, the lyrics in *Joynes* were written the day after the criminal act with which Defendant was charged and specifically mentioned violence toward the victim, whereas in this case, there is no evidence to show when the lyrics were written or that they related to the specific incident in question at all.

Under *Joynes*, the proper analysis to determine whether lyrics written by the Defendant are admissible under 404(b) is to conduct a *Getz* analysis.<sup>4</sup> The *Getz* analysis requires that:

- (1) The evidence of other crimes [or acts] must be material to an issue or ultimate fact in dispute in the case. If the State elects to present such evidence in its case-in-chief it must demonstrate the existence, or reasonable anticipation, of such a material issue.
- (2) The evidence of other crimes must be introduced for a purpose sanctioned by [D.R.E.] 404(b) or any other purpose not inconsistent with the basic prohibition against evidence of bad character or criminal disposition.
- (3) The other crimes must be proved by evidence which is “plain, clear and conclusive.” (citation omitted)
- (4) The other crimes must not be too remote in time from the charged offense.
- (5) The Court must balance the probative value of such evidence against its unfairly prejudicial effect, as required by D.R.E. 403.
- (6) Because such evidence is admitted for a limited purpose, the jury should be instructed concerning the purpose for its admission as required by D.R.E. 105.<sup>5</sup>

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<sup>4</sup> *Id.* (holding that the trial judge “properly admitted the rap song into evidence after engaging in the entire analysis required pursuant to this Court’s holding in *Getz*”).

<sup>5</sup> *Getz v. State*, 538 A.2d 726, 734 (Del. 1988) (citing *Renzi v. State*, 320 A.2d 711, 712 (Del. 1974)).

In the present case, any evidence of intent to sell or deliver the drugs would be material to the charge against Defendant of possession with intent to deliver. The State's purpose for introducing the evidence, i. e. to show Defendant's intent or state of mind to sell or deliver the drugs is also a proper purpose under D.R.E. 404(b). The references to selling cocaine in Defendant's lyrics, however, are not "plain, clear and conclusive" but are rather a suggestion that Defendant might have some involvement or experience with cocaine. Although the lyrics were found in the same search as the drugs, the State has not established a date when the lyrics were written and without this knowledge it is not possible to determine how closely related the lyrics are to these drugs.

There is also a danger that the lyrics, which make numerous references to selling drugs, are unfairly prejudicial under D.R.E. 403. The Court is given nine additional factors to help it conduct the balancing test under the fifth prong of *Getz*. These factors are:

(1) the extent to which the point to be proved is disputed; (2) the adequacy of proof of the prior conduct; (3) the probative force of the evidence; (4) the proponent's need for the evidence; (5) the availability of less prejudicial proof; (6) the inflammatory or prejudicial effect of admission of the evidence; (7) the similarity of the prior wrong to the current charged offense; (8) the effectiveness of limiting instructions; and (9) the extent to which prior act evidence would elongate the proceedings.<sup>6</sup>

Although the issue of intent to deliver is central in this case, the slight probative value of the lyrics is strongly outweighed by its potential prejudicial effect. Rap lyrics written by a defendant about selling drugs are not proof that the defendant dealt drugs on a certain occasion or at all. The lyrics would be highly prejudicial, however, because they contain numerous references to the Defendant selling drugs. There is also less prejudicial proof available to the State to show that the Defendant had the intent to sell or deliver the drugs allegedly in his possession. The State's need for this particular evidence, therefore, is outweighed by the prejudicial effect

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<sup>6</sup> *DeShields v. State*, 706 A.2d 502, 506-07 (Del. 1998).

of this evidence on the Defendant.

The State has referred to a number of cases from other jurisdictions which admitted rap lyrics into evidence for various purposes. In most of these cases, however, the lyrics were written shortly after the crime was committed or contained some specific reference to the crime allegedly committed. In the other cases, the lyrics were admitted to show possible motive for a crime or as proof that the defendant wrote the lyrics and not as evidence of intent or state of mind.

Identity

The presence of the lyrics in Defendant' s grandmother' s basement may be admissible to show evidence of identity, *i.e.* that Defendant resided there. However, testimony as to where the lyrics were found would be sufficient to allow the State to achieve its goal of establishing the proximity between the lyrics and the location of the drugs without revealing the specific lyrics.

Therefore, the State may refer to the location of the lyrics to show the relationship of the bedroom allegedly used by the Defendant and by doing so to show that the Defendant does reside in the bedroom. However, the lyrics are not admissible to prove Defendant' s intent or state of mind.

IT IS SO ORDERED.

/s/ William L. Witham, Jr.

WLW/dmh

oc: Prothonotary

xc: Order Distribution